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IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

MOTOR VEHICLE MANUFACTURERS ASSOCIATION OF THE UNITED STATES, INC., *et al.*,
Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents

CONSUMER ALERT AND PACIFIC LEGAL FOUNDATION,
Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents

UNITED STATES DEPARTMENT OF TRANSPORTATION, *et al.*,
Petitioners

v.

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *et al.*,
Respondents

On Writs of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF OF RESPONDENTS STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, *ET AL.*

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QUESTION PRESENTED

Whether the decision by the National Highway Traffic Safety Administration to revoke the "passive restraint" requirements of Federal Motor Vehicle Safety Standard 208 was arbitrary and capricious.

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COUNTER-STATEMENT OF THE CASE

I. THE RATIONALE FOR PASSIVE RESTRAINTS: REDUCING THE CARNAGE ON THE HIGHWAYS

Congress passed the National Traffic and Motor Vehicle Safety Act of 1966 (the "Safety Act"), 15 U.S.C. §§ 1381 *et seq.*, in response to the "grim roll of Americans lost and maimed on the Nation's highways." S. Rep. No. 1301, 89th Cong., 2d Sess. 1 (1966). Fifty thousand people were expected to die from automobile accidents in that year alone, and Congress feared that many more would join that roll if the "accelerating spiral of death" were not arrested.

During the next decade, the deaths did not stop. In 1980, motor vehicle crashes were the sixth leading cause of death; they were the leading cause of death for those under the age of 50. An average of 140 persons died every day in traffic accidents—a total of 51,077 fatalities. DOT, Motor Vehicle Safety '80 at 1, 3 (1981).

Moreover, as the Department of Transportation ("DOT") has pointed out, "fatalities are only part of this major public health problem." *Id.* at 2. Two of every three people born today are likely to be injured in a crash in their lifetimes. More than 4 million people are injured in automobile crashes each year, of whom 1.9 million require hospital treatment. Vehicle crashes are the most common cause of paraplegia and a major cause of epilepsy. "From an economic standpoint, . . . about $50 billion is spent in medical and rehabilitation costs, lost wages, welfare and property damage" each year. *Id.*

As the legislative history of the Safety Act makes clear, Congress had no confidence that the automakers would voluntarily make their products safer. Accordingly, it called for the "unconditional imposition of mandatory [safety] standards at the earliest practicable date [as] the only course commensurate with the highway death and injury toll." S. Rep. No. 1301 at 4. Moreover, Congress explained that one of its principal concerns was the " 'second collision'—the impact of the

individual within the vehicle against the steering wheel, dashboard, windshield, etc."—after the first collision between the automobile and another object. *Id.* at 3. Responding to that concern, DOT made one of its first actions under the Act the promulgation of Federal Motor Vehicle Safety Standard 208, which required the installation of seat belts in all passenger cars. 32 Fed. Reg. 2408 (1967). By preventing or minimizing the impact of the "second collision," such devices substantially reduce the risk of death or serious injury in traffic accidents. NHTSA, Final Regulatory Impact Analysis at IV-8 (Oct. 1981) (R. 64) [hereinafter, "NHTSA FRIA"].[1] As the Sixth Circuit has explained, the "idea is to assure that when the car stops dead, the passengers don't." *Chrysler Corp.* v. *DOT*, 472 F.2d 659, 663 (1972). Investigations by the National Highway Traffic Safety Administration ("NHTSA") have found that an occupant is 57 percent less likely to be injured or killed in a crash if he is wearing a seat belt. DOT, Motor Vehicle Safety, *supra* at 5.[2]

DOT soon recognized, however, that although existing manual belts could drastically reduce deaths and injuries if used, "only a very low percentage of the motoring population" was fastening its belts. 34 Fed. Reg. 11,148 (1969) (R. 2503). Today that figure is still only 11%,

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[1] "R. ——" refers to the joint appendix filed by the parties in the court of appeals and lodged with the Clerk of this Court. "Pet. App." refers to the appendix to the petition for a writ of certiorari filed in No. 82-354.

[2] Respondents have lodged with the Clerk a copy of a film produced by the Insurance Institute for Highway Safety which demonstrates the impact of the "second collision" on unrestrained automobile occupants and depicts the mitigating effect of a passive restraint system. The film was part of the passive restraint rulemaking record, and respondents urge the Court to view it in order to understand fully the problem to which the standard was addressed. Stills from the above-described film are contained in a separate appendix filed with this brief. Also included in that appendix are pictures of the various kinds of automatic belt systems discussed below.

NHTSA FRIA at IV-21 (R. 77), and every effort to increase it through educational campaigns has failed. *See infra* pp. 43-44. "More than one half of all the fatalities and far more than one half of all the serious injuries that occur on our nation's highways occur in vehicles in which the passengers or drivers were sitting on safety belts at the time of the accidents." [3]

As long ago as 1969, DOT saw the obvious solution to this dilemma: "the interests of motor vehicle safety demand the prompt development and installation of passive restraint systems"—*i.e.*, systems which do not require any affirmative action by the occupant (such as buckling a belt) to be effective. 34 Fed. Reg. at 11,148 (R. 2503). Because such automatic systems would require no affirmative action to provide protection, they were expected vastly to improve the low usage rates of manual belts. Therein lay their life-saving potential: NHTSA has estimated that for each increase of only 1 percentage point in belt use, 180 lives would be saved annually. NHTSA FRIA at IV-91 (R. 147).

II. THE HISTORY OF THE PASSIVE RESTRAINT RULE

DOT issued its first notice of proposed rulemaking on the subject of passive restraints in 1969. 34 Fed. Reg. at 11,148 (R. 2503). After three years of study, the Department issued a final amendment to Standard 208, requiring the installation of passive restraint systems in vehicles manufactured after August 15, 1975. In the interim period, from 1973 until 1975, the manufacturers were permitted to install either passive restraints or manual belts coupled with ignition interlocks. 37 Fed. Reg. 3911 (1972) (R. 2348).

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[3] Statement of NHTSA Administrator Peck, *Hearing on Small Car Safety Research Before the Subcomm. on Transportation, Aviation and Materials of the House Comm. on Science and Technology*, 97th Cong., 2d Sess., Tr. at 6 (Dec. 3, 1982) [hereinafter, "Peck Subcomm. Testimony"].

The automobile manufacturers immediately filed suit to challenge the rule, and in *Chrysler Corp.* v. *DOT*, 472 F.2d 659 (1972), the Sixth Circuit upheld the agency's decision to require passive restraints. However, because the court found that DOT had used an invalid test dummy in setting performance specifications for restraint systems, the court stayed the effectiveness of the rule pending correction of the error. *Id.* at 681.

In the meantime, the manufacturers had chosen to comply with Standard 208's interim requirements by installing ignition interlocks rather than passive restraints. Letters to Congress expressing irritation at being unable to start cars without fastening belts led to a legislative prohibition of the interlock requirement in 1974. *See* 15 U.S.C. § 1410b(b)(1). Congress did not disapprove the passive restraint standard itself, however. Indeed, it rejected a proposed amendment which would have banned the standard, adopting instead a provision that simply subjected any safety standard requiring compliance by airbags to a legislative veto. *See State Farm Mutual Automobile Insurance Co.* v. *DOT*, Pet. App. 8a, 34a (D.C. Cir. 1982) (citing legislative history). DOT spent the following years successfully correcting the test dummy problems involved in the *Chrysler* decision. *See* 42 Fed. Reg. 34,289, 34,290 (1977) (R. 1735).

In 1976, DOT Secretary William Coleman reviewed the passive restraints issue. He concluded that "passive restraints are technologically feasible, would provide substantially increased protection to the public in traffic accidents, and can be produced economically." Specifically, he found that "passive restraint technology . . . can be expected to prevent thousands of deaths and tens of thousands of injuries annually on the nation's highways." DOT, The Secretary's Decision Concerning Crash Protection at 6 (1976) (R. 2073) [hereinafter, "Coleman Decision"]. Secretary Coleman concluded, however, that the public should have more experience with passive restraints before they were made mandatory. *Id.* at 6

(R. 2073). Accordingly, he launched a demonstration program, contemplating contracts with the automakers for the production of up to 250,000 passive-equipped vehicles per year. *Id.* at 8 (R. 2075).

In 1977, DOT again proposed a timetable for mandatory installation of passive restraints. Like Secretary Coleman, Secretary Brock Adams concluded that the installation of passive restraints would prevent thousands of deaths and tens of thousands of injuries. 42 Fed. Reg. at 34,298 (R. 1743). On July 5, 1977, he issued an implementation schedule for the passive restraint standard.[4] Another judicial challenge was filed, and the court again upheld the standard. *Pacific Legal Foundation* v. *DOT*, 593 F.2d 1338 (D.C. Cir.), *cert. denied*, 444 U.S. 830 (1979). Congress declined to exercise its legislative veto, and the Senate committee with jurisdiction over NHTSA affirmatively endorsed the passive restraint rule. S. Rep. No. 481, 95th Cong., 1st Sess. 2 (1977).

III. PASSIVE RESTRAINTS ON THE HIGHWAYS: A RECORD OF PROVEN EFFECTIVENESS

In the years since the first notice of rulemaking was issued in 1969, a wide variety of passive restraint systems have been installed in automobiles and shown to work effectively. Between 1972 and 1976, approximately 10,000 GM vehicles were equipped with airbags, which are stored in the dashboard and inflate upon impact to protect the rider from collision with the car's interior. 42 Fed. Reg. at 34,290 (R. 1735). Because airbags provide automatic protection and cannot be deactivated, they have "100%" usage rates. On-the-road experience has convinced NHTSA that airbags are technologically sound and provide effective crash protection. NHTSA FRIA at XI-4 (R. 264).

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[4] Giving the automakers over four years lead time, the final schedule required installation of passive restraints in large cars by September 1, 1981, in mid-size cars by September 1, 1982, and in small cars by September 1, 1983. 42 Fed. Reg. at 34,289 (R. 1734).

Since 1975, automatic seat belts, which move into place automatically (without "buckling up") as the passenger enters the vehicle and closes the door, have been installed in over 350,000 Volkswagen Rabbits and in 8,000 1978 and 1979 GM Chevettes. Approximately 13,000 1980 Chevettes were also equipped with automatic belts, as were 1980 Toyota Coronas (as an option) and 1981 Toyota Cressidas (as standard equipment).[5] NHTSA has described all of these automatic belt designs as either practically or literally "nondetachable." Pet. App. 98a.[6] In the case of the 1980 Chevettes and 1980-81 Toyotas, egress may be obtained either by opening the door (which "opens" the belt) or, in an emergency, by reeling out the belt to create the necessary slack. *See infra* pp. 31-34.

Studies conducted by NHTSA of automatic belt systems already in service have revealed usage rates of at least 70%, which is approximately 40 percentage points higher than the usage rates of manual belts in the same models. Pet. App. 96a. According to NHTSA's most recent estimates, these levels of increased belt usage could prevent some 7,000 additional fatalities and 130,000 additional injuries over the lifetime of the automobiles sold

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[5] Pet. App. 98a; NHTSA FRIA at IV-29 (R. 85); NHTSA Hearing Tr. at 82 (Aug. 5, 1981) (R. 2549); NHTSA, Automobile Occupant Crash Protection Progress Rep. No. 3 at 27 (July 1980) (R. 1628) [hereinafter, "NHTSA Prog. Rep."]. NHTSA has given its Safety Award for Engineering Excellence to Toyota's version of the nondetachable automatic belt.

[6] The terms "detachable" and "nondetachable" as used by NHTSA are misleading, since most passive restraint systems now in use have some detachable feature. The VW Rabbit system is fully detachable, but because it is guarded by an ignition interlock it can only be detached after the car has been started. Notwithstanding this, NHTSA has said that "[t]he Rabbit automatic belts are, as a practical matter not permanently detachable." Pet. App. 98a. Although GM's Chevette system can also be partially detached at the lap, NHTSA has described it as "both practically and literally nondetachable," since "the [shoulder] belt remains attached at both ends." *Id.*

in each model year. NHTSA FRIA at IV-61 to 62 (R. 117-18).

Thus, on the eve of the deadline for commencing the mandatory installation of passive restraints, a wide variety of restraint technologies had already been utilized by the automakers and proven effective. Moreover, the manufacturers had already expended a substantial portion of the capital investment necessary to meet the deadline.[7] And every Secretary of Transportation since 1969 had agreed that the installation of such devices would save countless lives.[8] Yet, in February 1981—barely three weeks into a new Administration—NHTSA set in motion the administrative process that would ultimately lead to abandonment of the government's long-standing commitment to passive restraints.

IV. NHTSA'S DECISION TO RESCIND

The effort to dismantle the passive restraint program began with a proposal in February 1981 to postpone the implementation date by one year. Even at that time, the new Administration recognized that "it is likely that the delay caused by this alternative would cost an additional 9,000 deaths." NHTSA Feb. RA at IV-4. The express justification was the economic "difficulties of the automobile industry and some of its members." 46 Fed. Reg. 12,033 (1981) (R. 1622). Two months later, the agency adopted a partial delay proposal, again stressing

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[7] Pet. App. 13a; NHTSA, Regulatory Analysis at V-2 (February 1981) [hereinafter, "NHTSA Feb. RA"].

[8] As late as July 1980, NHTSA reported that:

> "On the road experience in thousands of vehicles equipped with air bags and automatic safety belts has confirmed agency estimates of the life-saving and injury-preventing benefits of such systems. When all cars are equipped with automatic crash protection systems, each year an estimated 9,000 more lives will be saved, and tens of thousands of serious injuries will be prevented." NHTSA Prog. Rep., *supra* at 4 (R. 1627).

the "economic situation of the industry." 46 Fed. Reg. 21,172, 21,174 (1981) (R. 1274). On the same day, NHTSA proposed the rescission of the standard. 46 Fed. Reg. 21,205 (1981) (R. 12). Both decisions were announced by the White House Press Office as part of a larger package of "Actions to Help the U.S. Auto Industry." (R. 1281, 1321).

The agency's Notice of Proposed Rulemaking indicated that NHTSA intended to review the standard to determine whether it "met the requirements of cost-effectiveness provided by Exec. Order No. 12991, 46 Fed. Reg. 13,193 (1981)." Brief for the Federal Parties at 8 n.9. *See* 46 Fed. Reg. at 21,205 (R. 12). Accordingly, three cost-benefit analyses were performed by professional economists and submitted to the docket. All three confirmed that the benefits of the rule far exceeded its cost. (R. 511, 606, 714.) In the words of Professor William Nordhaus of Yale University:

> "[T]he passive restraint rule is, from an economic point of view, as important as any environmental, health, or safety rule on the books. If the estimates of the impact on fatalities and injuries are accurate, a rescission would be equivalent to repealing a law that cuts in half the homicide rate. It is equivalent to foregoing the medical advances that allowed the virtual elimination of death from tuberculosis over the last quarter century." (R. 514.)

Notwithstanding these findings, the new NHTSA Administrator rescinded the rule on October 29, 1981—over the unanimous opposition of his senior staff. *See* Statement of NHTSA Admin. Peck, Press Conference Tr. at 25 (Oct. 23, 1981) (R. 1269); Peck Subcomm. Test., *supra* at 29-30. This time, however, the asserted justification was neither the economic state of the auto industry, nor—in light of the economists' calculations—an unfavorable cost-benefit analysis. Rather, the rescission was now premised almost entirely on the fact that some manufacturers had threatened to meet the standard by

using a new, so-called "detachable" automatic belt. Unlike any passive restraint device in use prior to 1981, NHTSA suggested, the new design permitted the occupant to separate or "detach" the system with such relative ease as to invite disuse. Although six months before, the agency had described these devices as "poorly designed," [9] NHTSA now cited this development as the basis for rejecting as irrelevant its prior studies of automatic belt systems. Pet. App. 92a, 97a. *See* NHTSA FRIA at IV-51 (R. 107). Instead of adopting the obvious suggestion pressed in the rulemaking—that NHTSA bar the new, easily detachable belt as a means of complying with the standard—the agency abandoned the standard altogether.

The respondents in the present action petitioned for review in the District of Columbia Circuit. After reviewing the 12-year rulemaking record, the Court of Appeals found the agency's decision to revoke the rule "a paradigm of arbitrary and capricious agency action because NHTSA drew conclusions that are unsupported by evidence in the record and then artificially narrowed the range of alternatives available to it under its legislative mandate." Pet. App. 4a. The only explanation the court could find for the agency's action was that its "analysis . . . has been distorted by solicitude for the economically depressed automobile industry—which is not the Agency's mandate—at the expense of consideration of traffic safety, which is." *Id.* at 70a. As Judge Edwards observed in concurrence, "the agency decision appears to be nothing more than a determined effort to achieve a particular result without regard to the facts at hand." *Id.* at 75a-76a.

Accordingly, the court vacated the rescission and remanded the matter to the agency. *Id.* at 161a. However, because the effect of vacating the rescission was to leave the prior rule standing, and because the deadline for

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[9] NHTSA, Final Regulatory Impact Analysis at V-24 (April 1981) (R. 2548) [hereinafter, "NHTSA April RIA"].

installation of passive restraints under that rule was then only one month away, the court stayed the effectiveness of its order until September 1983.

SUMMARY OF ARGUMENT

By its decision in this case, NHTSA abandoned a concededly life-saving rule because the auto industry threatened to comply with a device that the agency believed would defeat the rule's purpose. Hence, this is not, as petitioners attempt to portray it, a case in which an agency exercised its discretion in a reasonable, if debatable, fashion. Nor is it a landmark case in which the court of appeals improperly limited an agency's ability to deregulate by applying too strict a standard of review. Here, the agency failed altogether to "exercis[e] the discretion with which Congress has empowered it." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 168 (1962). Instead, it simply transferred that discretion wholesale to the very industry it was established to regulate. NHTSA's action cannot withstand the "thorough, probing, in-depth review" which this Court has traditionally applied to ensure that informal rulemaking is not arbitrary and capricious. *Citizens to Preserve Overton Park, Inc.* v. *Volpe*, 401 U.S. 402, 415 (1971).

There is no uncertainty as to the essential facts. The record establishes that existing passive restraint technology—either automatic seat belts or airbags—would dramatically reduce the loss of life and serious injury which occur in the "second collision," between the automobile occupant and the windshield or other parts of the vehicle's interior. Over the past decade, almost 400,000 automobiles have been equipped with automatic seat belts. NHTSA *concedes* that if all new cars were equipped with automatic belts like those already in existence, they would substantially improve upon the usage rates of manual belts, would prevent a substantial number of deaths and injuries, and would make the rule cost-beneficial. NHTSA's own figures indicate that a manda-

tory passive restraint rule would save thousands of lives, tens of thousands of injuries, and billions of dollars.

In response to Congress' express concern with the carnage caused by the "second collision," NHTSA has studied a passive restraint rule since 1969, and has had one in effect since 1977. Yet, despite all of the foregoing evidence, the agency has now rescinded that rule. According to NHTSA, it did so because various automakers indicated they would comply, not with the already road-tested belts or airbags, but with new belts that could be easily detached and stowed away. Those belts, said the agency, would be much like the old manual belts. Hence, it could not conclude that the demonstrated improvements in usage would apply to the belts the manufacturers now planned to install.

As the court below found, "the absurdity of this Orwellian reasoning [is] obvious." The agency has turned its organic statute, the Safety Act, on its head. That Act was borne out of Congressional dissatisfaction with the pace of industry's development of safety equipment. Accordingly, Congress instructed NHTSA to force the development of new and *better* technology through the imposition of mandatory safety standards. Instead, in this case the agency surrendered to the industry's decision to use technology allegedly *worse* than that already on the road.

The record refutes NHTSA's conclusion that the new belts would not have substantial safety benefits. But even if the new belts were as bad as NHTSA said, the agency had before it an obvious alternative to rescinding the rule: it could simply have barred the new design as a means of compliance. Although the new NHTSA Administrator considered that alternative, he summarily rejected it. Instead, over the unanimous opposition of his expert staff, he reversed the agency's decade-long commitment to passive restraint technology and rescinded the rule outright. In this context, affirmance of NHTSA's rescission by the court of appeals would have amounted to rubber-stamp approval of arbitrary agency action.

ARGUMENT

I. THE RESCISSION OF THE PASSIVE RESTRAINT RULE IS SUBJECT TO THE TRADITIONAL "ARBITRARY AND CAPRICIOUS" TEST

The standard of review appropriate for the informal rulemaking conducted by NHTSA in this case is well established. The Safety Act expressly provides that both the procedural and judicial review provisions of the Administrative Procedure Act (APA), 5 U.S.C. §§ 551-59; 5 U.S.C. §§ 701-06, "shall apply to all orders establishing, amending, *or revoking* a Federal motor vehicle safety standard." 15 U.S.C. § 1392(b) (emphasis added). The 1974 Amendments to the Safety Act further specify that "[s]ection 553 of Title 5 shall apply" to occupant crash protection standards. 15 U.S.C. § 1410b(c)(2). As this Court has made clear, where informal rulemaking is conducted pursuant to section 553 of the APA, "agency action must be set aside if the action was 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" *Citizens to Preserve Overton Park*, 401 U.S. at 414, *citing* 5 U.S.C. § 706(2)(A).

The scope of "arbitrary and capricious" review is also well recognized. As the Court explained in *Overton Park*, the standard is ultimately deferential and does not authorize the court to substitute its judgment for that of the agency. Nonetheless, such deference does "not . . . shield [the agency's] action from a thorough, probing, in-depth review." Moreover, the court's "inquiry into the facts is to be searching and careful." 401 U.S. at 415, 416.

A. Petitioners Have Attacked Strawman Arguments Regarding the Standard of Review

Petitioners have devoted the bulk of their briefs to establishing three basic legal propositions: (1) that the "burden of proof" in this case rests on those challenging NHTSA's decision, not on the agency; (2) that a regulation may be rescinded if there is substantial uncertainty

that it will work as expected; and (3) that the post-enactment legislative history of the Safety Act does not heighten the standard of review of NHTSA's actions.

Respondents agree with each and every one of these points. As set forth in State Farm's Brief in Opposition to the Petitions for Certiorari at 9-16, respondents believe that the court below also agreed with these points, and that petitioners have twisted that court's words out of context in order to make this appear to be a landmark case on legal doctrine—which it is not—rather than the intensely factual case which it is. Co-respondent National Association of Independent Insurers discusses this point in detail in Part III of its brief before this Court, with which State Farm joins.

In any event, petitioners' challenges to the court of appeals' analysis may be put "aside as irrelevant, since [this Court] must decide whether the action of the court below was correct, irrespective of the reasoning by which such action was induced." *ICC* v. *Illinois Central R.R.*, 215 U.S. 452, 471 (1910).[10] The question before this Court is not whether the court of appeals acted in an arbitrary and capricious fashion, but whether the agency did.

B. The Federal Parties' Proposal for a Radical New Definition of "Arbitrary and Capricious" Should Be Rejected

Despite the well-settled *Overton Park* formula, the federal parties propose a radical new definition of the "arbitrary and capricious" standard of 5 U.S.C. § 706(2)(A)—one which both analogizes that standard to "minimum rationality" analysis under the Due Process Clause, and at the same time equates it with the requirement of 5 U.S.C. § 706(2)(C) that an agency's action not exceed

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[10] A "prevailing party may, of course, assert in a reviewing court any ground in support of his judgment, whether or not that ground was relied upon or even considered by the trial court." *Dandridge* v. *Williams*, 397 U.S. 471, 475 n.6 (1970).

the scope of its statutory authority. Brief for the Federal Parties at 22-29.

The federal parties are unable to cite a single opinion of any court that has made the suggested analogy between the APA and the Due Process Clause. That is hardly surprising, since review of administrative action under the APA and review of legislative action under the Constitution are readily distinguishable. The powers of Congress and the state legislatures are both superior to the delegated powers of administrative agencies and entitled to greater deference because of the need to avoid unnecessary constitutional conflict.[11]

The two cases cited by the federal parties also contradict petitioners' assertion that the "arbitrary and capricious" standard is merely a variant of the rule that agency action may not exceed the scope of agency authority as delegated by Congress. Both cases expressly treat the two as independent requirements, *ICC* v. *Union Pacific R.R.*, 222 U.S. 541, 547 (1912); *ICC* v. *Illinois Central R.R.*, 215 U.S. at 470, as does the legislative history, *see* S. Doc. No. 248, 79th Cong., 2d Sess. 213-14, 278 (1946). So, of course, does the statute. *Compare* 5 U.S.C. § 706(2)(A) *with* § 706(2)(C). And *ICC* v. *Union Pacific* makes the further point that "arbitrary and capricious" is not only a separate standard, but that it requires the court to review the factual basis of the

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[11] Petitioners' suggestion that the APA was intended to incorporate the scope of Due Process review found in the two 1910-1912 cases cited in the text, *infra*, is surprising. As this Court is well aware, in 1910-1912 the standard of due process review applied by the Supreme Court was the strict scrutiny of *Lochner* v. *New York*, 198 U.S. 45 (1905), not the "minimum rationality" analysis of the substantially later cases cited in petitioners' brief. Moreover, the suggestion that the APA was intended to do no more than incorporate an existing standard of review ignores the major theme of that statute's legislative history: that administrative agencies had become too powerful, and that *more stringent* judicial review of agency action was necessary. *See* S. Doc. No. 248, 79th Cong., 2d Sess. 217, 278, 337, 383 (1946).

agency's decision—not merely its consistency with its governing statute. 222 U.S. at 547, 548. This Court made the same two points in *Overton Park*.[12]

Not surprisingly, neither the Motor Vehicle Manufacturers Association ("MVMA") nor the Pacific Legal Foundation has joined the federal parties on this point. No doubt the private petitioners recognize that the definition of "arbitrary and capricious" applied in this case will also apply to other cases, and thus will govern the actions of future Administrations which may be as eager to regulate as this one is to deregulate. Before urging a new standard which would have the judiciary abdicate its traditional reviewing role and simply rubber-stamp agency decisions, the federal parties would do well to remember Justice White's words in *Burlington Truck Lines*:

> "[E]xpert discretion is the lifeblood of the administrative process, but 'unless we make the requirements for administrative action strict and demanding, *expertise*, the strength of modern government, can become a monster which rules with no practical limits on its discretion.' 'Congress did not purport to transfer its legislative power to the unbounded discretion of [a] regulatory body.'" 371 U.S. at 167 (emphasis in original).

C. MVMA's Proposed "Narrower than Arbitrary and Capricious" Standard Should Also Be Rejected

MVMA argues that the rescission of an agency rule should be judged by the same standard a court would use to judge an agency's refusal to promulgate a rule in the first place—a standard considerably narrower than the traditional arbitrary and capricious test, and in fact

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[12] "Scrutiny of the facts does not end, however, with the determination that the Secretary has acted within the scope of his statutory authority. Section 706(2)(A) requires a finding that the actual choice was not 'arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law.'" 401 U.S. at 416.

"close to the borderline of nonreviewability." MVMA (Court of Appeals) Brief at 18. *See* MVMA (Supreme Court) Brief at 35. That extremist position should be rejected for three reasons.

First, the Safety Act expressly equates an order "revoking" a safety standard with one "establishing" such a standard for purposes of both rulemaking procedure and judicial review. 15 U.S.C. § 1392(b). Indeed, the APA itself defines "rule making" as the process of "formulating, amending, *or repealing* a rule." 5 U.S.C. § 551(5) (emphasis added). *See NRDC* v. *EPA*, 683 F.2d 752, 760-64 (3d Cir. 1982). Neither the Safety Act nor the APA suggests any similar equivalence for orders "refusing" to promulgate standards in the first place, which have traditionally been reviewed much more narrowly than other kinds of agency action. *See NRDC* v. *SEC*, 606 F.2d 1031 (D.C. Cir. 1979).

Second, a revocation is substantially different than a mere failure to act, because revocation constitutes a *reversal* of the agency's former views as to what course is both in the public interest and consistent with the intent of Congress. As was stated in *Atchison, Topeka & Santa Fe Ry.* v. *Wichita Board of Trade*, 412 U.S. 800, 807-08 (1973), a "settled course of behavior embodies the agency's informed judgment that, by pursuing that course, it will carry out the policies committed to it by Congress. There is, then, at least a presumption that those policies will be carried out best if the settled rule is adhered to." Accordingly, a long line of judicial opinions require that "an agency changing its course must supply a *reasoned* analysis" of the factors justifying a change. *Greater Boston Television Corp.* v. *FCC*, 444 F.2d 841, 852 (D.C. Cir. 1970) (Leventhal, J.) (emphasis added), *cert. denied*, 403 U.S. 923 (1971).[13]

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[13] *See, e.g., NLRB* v. *Weingarten*, 420 U.S. 251, 268 (1975) (Burger, C.J., dissenting) ("the change ought to be justified by a reasoned Board opinion"); *Secretary of Agriculture* v. *United States*, 347 U.S. 645, 653 (1954) (the change must be "adequately" ex-

MVMA's assertion that there has been no reversal of course in this case is patently false. NHTSA has clearly reversed the implementation order which had been a final rule since 1977. But more important, NHTSA's conclusion that it could not find that passive restraints were effective reversed the contrary findings of every DOT Secretary since 1969. *See supra* pp. 3-7. Secretary Coleman was no exception to that consistent course. Although he was not yet prepared in 1976 to reinstate the rule which the *Chrysler* court has suspended, he did find that passive restraints were "a reliable and effective means of substantially reducing deaths and injuries on the nation's highways." Coleman Decision, *supra* at 10 (R. 2077).[14] That was still the agency's view when it released its July 1980 Progress Report (R. 1627). *See supra* note 8. Indeed, even the present Administration adhered to that view as late as February 1981. NHTSA Feb. RA at IV-4 ("It is likely that [a one-year delay] would cost an additional 9,000 deaths."). Given that prologue, the agency's announcement six months later that it was suddenly unable to determine the efficacy of passive restraints cannot be viewed as anything less than a sharp reversal of course.

Third, the concerns that mandate a narrow standard of review where an agency refuses to conduct rulemak-

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plained); *NRDC* v. *EPA*, 683 F.2d at 760; *Wheaton Van Lines, Inc.* v. *ICC*, 671 F.2d 520, 522 (D.C. Cir. 1982); *Roadway Express, Inc.* v. *NLRB*, 647 F.2d 415, 419 (4th Cir. 1981).

The courts' insistence that agencies provide reasoned explanations for their changes of course is primarily intended not to protect justified reliance, but rather to ensure that prior policies and standards are not being "ignored" in a manner "indifferent to the rule of law." *CBS* v. *FCC*, 454 F.2d 1018, 1026 (D.C. Cir. 1971). This judicial concern is applicable whether or not the final rule has actually gone into effect. *Cf. NRDC* v. *EPA*, 683 F.2d at 760-64 (postponement of final rule, even before its effective date, is subject to APA rulemaking procedures).

[14] Specifically, Secretary Coleman concluded that the installation of passive belts alone would save 6,800 lives per year, while installation of airbags would save 9,100 lives. *Id.* at 40 (R. 2107).

ing in the first instance are simply inapplicable to revocations of existing rules. In the latter situation, review does not require the agency to divert its resources to areas which it has never considered important, nor does it require the court to review "nondecisions" in the absence of a factual record. Here, the agency has made passive restraints one of its highest priorities for twelve years, and there is a substantial rulemaking record available for judicial review. Indeed, the very case that MVMA cites as establishing the narrow standard for agency inaction, *NRDC* v. *SEC*, expressly states that that standard is inapplicable to agency reversals. 606 F.2d at 1049 n.23.

Petitioners have been unable to cite a single case in which a court has applied the narrow "agency inaction" test to the revocation of a rule. To the contrary, every case respondents have been able to discover involving agency "deregulation" has applied the traditional arbitrary and capricious test.[15] This Court applied precisely that standard in upholding the FCC's rescission of its policy of regulating radio program formats in *FCC* v. *WNCN Listeners Guild*, 450 U.S. 582, 594 n.30 (1981).

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Although petitioners strive to portray the court of appeals as having applied a novel standard of review, in the end they concede that the "court below . . . went on to declare that '[b]y *any* measure of reasoned decisionmaking, NHTSA's action was arbitrary and capricious.'" Brief for Consumer Alert and Pacific Legal Foundation at 24 (emphasis in original) [hereinafter, "PLF Brief"], *quoting* Pet. App. 68a. Accordingly, the ultimate ques-

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[15] *See Action on Smoking and Health* v. *CAB*, No. 79-1044, slip op. at 12-13 (D.C. Cir. Jan. 28, 1983); *NAACP* v. *FCC*, 682 F.2d 993 (D.C. Cir. 1982); *National Tour Brokers Ass'n* v. *ICC*, 671 F.2d 528, 530, 533 (D.C. Cir. 1982); *Wheaton Van Lines, Inc.* v. *ICC*, 671 F.2d 520, 527 (D.C. Cir. 1982); *Malrite T.V.* v. *FCC*, 652 F.2d 1140, 1149 (2d Cir. 1981), *cert. denied*, 102 S. Ct. 1002 (1982); *ILGW* v. *Donovan*, Civ. No. 81-2606, slip op. at 7 (D.D.C. July 23, 1982).

tion before this Court is not whether the court below applied too strict a standard of review, but rather whether the actions of the agency were arbitrary and capricious under the well-recognized *Overton Park* standard. Analysis of the facts before the court of appeals demonstrates that NHTSA's rescission was indeed "arbitrary and capricious."

II. IT WAS ARBITRARY AND CAPRICIOUS TO RESCIND BECAUSE OF A NEW, ALLEGEDLY INEFFECTIVE BELT DESIGN WHEN EFFECTIVE PASSIVE RESTRAINTS WERE ALREADY IN SERVICE

As the legislative history makes abundantly clear, Congress enacted the Safety Act because it believed that the automakers' voluntary efforts to improve automobile safety had "largely failed." [16] "The only course commensurate with the highway death and injury toll," said the Senate Committee on Commerce, was the "unconditional imposition of mandatory standards at the earliest practicable date." S. Rep. No. 1301, *supra* at 4. Accordingly, the Act directs that the Secretary of Transportation "shall" establish mandatory motor vehicle safety standards. 15 U.S.C. § 1392(a).

Congress declared that "safety" was to "be the overriding consideration in the issuance of [the] standards." S. Rep. No. 1301 at 6. *See* H.R. Rep. No. 1776, 89th Cong., 2d Sess. 16 (1966). Those standards were to be performance standards, concentrating not on the design

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[16] S. Rep. No. 1301, *supra* at 4. The Senate Commerce Committee summarized its findings as follows:

> "[T]he committee met with disturbing evidence of the automobile industry's . . . overriding stress on power, acceleration, speed, and 'ride' to the relative neglect of safe performance or collision protection. The committee cannot judge the truth of the conviction that 'safety doesn't sell,' but it is a conviction widely held in industry which has plainly resulted in the inadequate allocation of resources to safety engineering." *Id.* at 2.

of a particular safety device, but rather on the required minimum level of safety improvement it must attain. S. Rep. No. 1301 at 6. Moreover, because Congress had become disenchanted with the voluntary efforts of the automakers, it intended the standards to be "technology forcing." That is, they were to go beyond existing technology and were "to impel automobile manufacturers to develop and apply new technology to the task of improving the safety design of automobiles as readily as possible." *Chrysler Corp.* v. *DOT*, 472 F.2d at 671-72. *See* S. Rep. No. 1301 at 1, 10. As the Department of Justice explained to the Sixth Circuit, an "important reason for passage of the [Safety] Act was to insure that the pace of safety measures would *not* be left to industry." Brief for the Dep't of Justice, *Chrysler Corp.* v. *DOT*, at 62 (emphasis in original).[17]

The irony of this case is that here NHTSA did not need to compel the development of new technology. On the contrary, NHTSA rescinded Standard 208 despite the fact that passive restraint devices already in service in thousands of cars had been proven effective by the agency's own studies.

A. NHTSA Concedes that Effective Passive Restraints Already Exist

As set out in detail in the Counter-statement of the Case, *supra* at 5-7, since the early 1970's 10,000 automobiles have been equipped with airbags and almost 400,000 have been equipped with automatic belts of various designs. NHTSA has described all of the automatic belt designs so far in use as either practically or literally "nondetachable." Pet. App. 98a; *see supra* note 6. NHTSA's studies of these automatic belt systems have revealed usage rates of at least 70%, which is approximately 40 percentage points higher than the usage rates

[17] In light of this legislative history, the federal parties' assertion that the "Safety Act essentially embodies a congressional presumption *against* regulation" is frivolous. Brief at 31 n.26.

of manual belts in the same models.[18] According to NHTSA's own current estimates, if introduced into all new cars, these levels of increased belt usage would prevent some 7,000 additional deaths and 150,000 additional injuries over the lifetime of the automobiles sold in *each* model year. NHTSA FRIA at IV-61, 62 (R. 117, 118).

NHTSA has estimated the costs of automatic belts at just $89 per car.[19] By the agency's own analysis, the passive restraint standard's benefits (measured in terms of the savings in productive manpower not lost to injury and death, as well as associated medical savings) would outweigh its costs if usage rates increased by just 13 percentage points over current levels—from 11.4% to 24.4%. NHTSA FRIA at A-10 (R. 283-84); Pet. App. 17a. Yet, NHTSA's surveys of automatic belt systems already installed in hundreds of thousands of automobiles reveal that those devices increased belt use by over 40 percentage points, roughly three times the break-even level. Pet. App. 96a.

All three of the cost-benefit analyses submitted to NHTSA by professional economists confirm this analysis. All three concluded that thousands of deaths and tens of thousands of injuries would be prevented by the installation of passive restraints.[20] All three, using NHTSA's

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[18] Various NHTSA-sponsored studies found that usage rates of automatic belts ranged from 70% to 90%; the increases over the manual belt rates ranged from 38 percentage points to 64 percentage points. Pet. App. 96a; NHTSA FRIA at IV-29, IV-32 to 33 (R. 85, 88-89); *see* R. 824, 871, 922, 1012.

[19] This estimate includes both the cost of the belt and added fuel costs over the life of the car. NHTSA FRIA at A-8 (R. 282). It is 50 to 100% higher in *constant* dollars than cost estimates announced by the agency as recently as 1980. There is good reason to believe that the recent estimate has been overinflated. Graham Comment at 1, 9-12 (R. 606, 607, 615-18). *See* Pet. App. 16a n.9.

[20] Nordhaus Comment at 1 (May 1981) (R. 511); Graham Comment at 7 (May 1981) (R. 612); Arnould & Grabowski, *Auto Safety Regulation: An Analysis of Market Failure*, 12 Bell J. Econ. 27, 39 (1981) (R. 714, 726).

own figures, concluded that the benefits of passive restraints—either automatic belts or airbags—would far outweigh their costs. (R. 511, 612, 729-30.) This was the same conclusion that NHTSA itself had reached prior to the 1981 rulemaking, *see, e.g.*, Coleman Decision, *supra* at 49 (R. 2116) (3.5 benefit/cost ratio for passive belts); it is the same conclusion that every cost-benefit analysis ever conducted on passive restraints has reached, *see* U.S. Congress, Office of Technology Assessment, Technology and Handicapped People: Background Paper No. 1, at 34 (Sept. 1982). Indeed, Professor Nordhaus concluded that the *net* economic benefit to society would be $2.4 billion per year and $33 billion over time. Nordhaus Comment at 1 (R. 511).[21]

Finally, it must be emphasized that the foregoing analysis is based, not on a disputed premise, but on NHTSA's own concession that airbags and nondetachable belts would effectively reduce the nation's death and injury toll. As to airbags, NHTSA's Final Regulatory Impact Analysis states:

> "The Agency has no basis at this time for changing its earlier conclusions in 1976 and 1977 that basic air bag technology is sound and has been sufficiently demonstrated to be effective in those vehicles in current use . . . ." NHTSA FRIA at XI-4 (R. 264).

As to nondetachable belts, although the agency did suggest that *some* of the 40-plus percentage point increase in usage observed in Rabbits and Chevettes might not carry over to other automobiles for demographic rea-

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[21] Respondents agree with NHTSA's view that "the outcome of a dollar-based benefit-cost analysis . . . cannot be used as the sole criterion for decisionmaking." As the agency explains, this is because its "governing statute dictates that while costs and benefits must both be considered, safety is of overriding concern." NHTSA FRIA at A-2 (R. 276). Although that rationale would justify promulgating a standard which provided safety benefits even if its financial benefits did not outweigh its dollar costs, it does not justify rescinding a standard which yields substantial net benefits measured in terms of *both* lives and dollars.

sons,[22] NHTSA concluded that "most of the increase in automatic belt Rabbits and Chevettes is due to the nondetachability feature."[23] Indeed, it concluded that fully four-fifths of the increase could be accounted for by the nondetachability feature and that only the remaining one-fifth could be attributed to demographics. Pet. App. 102a-103a. According to NHTSA's own Final Regulatory Impact Analysis, even that level of increased usage would save almost 6,000 lives and prevent over 100,000 injuries each year. NHTSA FRIA at IV-62 (R. 118).

Throughout the discussion that follows, therefore, it must be kept in mind that *the agency has never expressed uncertainty with regard to the substantial safety benefits of nondetachable belts and airbags.* To the extent that NHTSA has expressed uncertainty, it has done so only with regard to the new detachable belts. Pet. App. 104a-105a. None of petitioners' legal arguments regarding the rescission of regulations under conditions of uncertainty has any relevance whatsoever to nondetachable belts or airbags.

B. Despite the Availability of Effective Passive Restraints, NHTSA Improperly Permitted the Preferences of Some Automakers for An Allegedly Ineffective Design To Govern This Rulemaking

Despite all of the evidence generated by NHTSA in favor of its passive restraint standard, the new Ad-

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[22] As discussed *infra* at 40-41, even that suggestion is contradicted by the record evidence.

[23] NHTSA stated that this was true "whether an interlock or other design feature" was used. It did not suggest that there was any difference, as far as usage rates were concerned, between interlock-guarded belts—which it considered "practically" nondetachable—and those which the agency viewed as "literally" nondetachable. Pet. App. 102a, 98a. In fact, the literally nondetachable belt in the 1980 Chevette was found by the agency to have a slightly higher incremental usage rate than the interlock-guarded belt in the 1978-79 Chevette (39% increased usage versus 38%). NHTSA FRIA at IV-32 to 33 (R. 88-89). *See supra* note 6, which describes these systems.

ministrator revoked the rule on October 29, 1981. The key rationale was a "drastic change" in the plans of the automakers: some had threatened to meet the standard by using an entirely new, "easily detachable" automatic belt. Pet. App. 97a.[24]

Petitioners have endeavored to obfuscate the Administrator's decision by suggesting that there were other "changed circumstances," besides the new detachable belt, which were not anticipated in 1977, and which now render invalid the "assumptions" upon which the rule was originally based. These allegedly were the nation's switch from large to small cars, and the manufacturers' switch from airbags to belts. MVMA Brief at 9 & nn. 18, 21. In fact these changes clearly were anticipated in 1977 and actually strengthen the case for the standard.[25] NHTSA itself has never given any reason

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[24] MVMA endeavors to give the impression that the detachable belts were really nothing new and had always been contemplated. Brief at 43-44. NHTSA plainly disagrees, calling the manufacturers' plans a "drastic change," Pet. App. 97a, and noting that "there are no detachable systems currently available," NHTSA FRIA at IV-51 (R. 107). Although buckle release systems had previously been used, either they did not completely detach the belt, or they were accompanied by ignition interlocks which made them, "as a practical matter, not permanently detachable." Pet. App. 98a. And even those systems were not "easily detach[able]" and stowable, as are the manufacturers' new designs. *Id.* at 97a.

[25] In announcing its 1977 rule, NHTSA explained that an "important consideration" in mandating passive restraints was the "trend toward smaller cars," which were more dangerous in crashes and which had already proven well-suited to passive restraints (65,000 restraint-equipped VW's were already on the road at the time). 42 Fed. Reg. at 34,294-95, 34,290-91 (R. 1739-40, 1735-36). Today, the agency even argues that small car buyers are *more* likely than large cars buyers to accept and use automatic restraints. Pet. App. 98a.

Similarly, the 1977 Final Rule included an analysis of the effect of compliance solely by automatic belts rather than airbags, and concluded that 6,800 deaths and 78,000 serious injuries would still be prevented. 42 Fed. Reg. at 34,298 (R. 1743). Several of the cost-benefit analyses conducted during the instant rulemaking concluded

why any change, other than the manufacturers' decision to install easily detachable belts, led to the rescission.

According to NHTSA, the importance of the manufacturers' decision to use detachable rather than nondetachable belts was that, "unlike the automatic belts in Rabbits and Chevettes," the new belts "would be like today's manual lap and shoulder belts in that they can be easily detached and left that way permanently."[26] Hence, "[i]nstead of being equipped with automatic restraints that will protect substantially greater numbers of persons than current manual belts, most new cars would have had a type of automatic belt that might not have been any more acceptable to the public than manual belts." Pet. App. 97a, 98a, 92a. Although in April 1981 this very analysis had led the agency to characterize the proposed detachable belts as "poorly designed," NHTSA April RIA at V-24 (R. 2548), in October NHTSA seized on that change as the reason for rejecting its prior tests on other designs as irrelevant. Pet. App. 97a-99a.

It is not surprising that the court of appeals found the "absurdity of this Orwellian reasoning . . . obvious." Pet. App. 58a. The agency had simply turned the Safety Act on its head. Instead of forcing the industry to develop new and *better* technology as Congress had contemplated, NHTSA surrendered to the automakers' threat to use technology *worse* than that already on the road. Instead of insisting on a performance standard requiring a certain level of safety results, the agency retreated before an eleventh hour industry decision to use a design which was worse than alternatives known to meet the performance criteria. Hence, this is not, as petitioners attempt

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that automatic belts were even more cost-effective than airbags. Arnould & Grabowski, 12 Bell J. Econ. at 43 (R. 730); Graham Comment at 6 (R. 612).

[26] This assertion gave the court of appeals serious doubts as to whether the detachable belts complied with the passive restraint standard at all. Pet. App. 57a.

to portray it, a case in which NHTSA exercised its discretion in a reasonable, if debatable, fashion. Here, the agency failed altogether to "exercis[e] the discretion with which Congress has empowered it." *Burlington Truck Lines*, 371 U.S. at 168. *See Pillai* v. *CAB*, 485 F.2d 1018, 1030 (D.C. Cir. 1973). Instead, it simply transferred that discretion wholesale to the very industry it was charged with regulating.

C. It Would Have Been Arbitrary and Capricious for NHTSA To Have Ignored the Obvious Alternative of Barring the Allegedly Ineffective Design

NHTSA had obvious alternatives to capituiation to the automakers. Chief among them was plugging the loophole which industry was threatening to use to defeat the very purpose of the passive restraint rule. This could have been done by simply barring compliance by the new type of detachable belt, which would still have permitted compliance by a wide variety of other belt designs, as well as by airbags.

Petitioners have argued at length in their briefs that the agency had no responsibility to consider this obvious alternative and may have been procedurally barred from considering it. Neither of those points has any validity. Moreover, as section D below explains, NHTSA *did* in fact consider the suggested alternative, but rejected it for arbitrary and capricious reasons.

1. *The Agency Could Not Simply Ignore the Obvious Alternative to Rescission.* In *Burlington Truck Lines, Inc.* v. *United States*, this Court set aside an ICC order because the agency had failed to state a rational basis for its choice of one action when another alternative was also available. "The agency," said Justice White, "must . . . 'give clear indication that it has exercised the discretion with which Congress has empowered it.'" There must be a "rational connection between the facts found and the choice made." 371 U.S. at 168.

In *Pillai* v. *CAB*, the District of Columbia Circuit reached the same conclusion. There, the CAB had approved a private, multilateral agreement regarding airline rates without first making a "considered evaluation" of a variety of other alternatives, including bilateral agreements. That "artificial narrowing of options," Judge Wilkey held, was "arbitrary and capricious." 485 F.2d at 1027, 1029. Contrary to petitioners' assertions, neither *Burlington* nor *Pillai* involved statutory provisions which required the agency—explicitly or implicitly—to consider alternatives. Rather, these cases are based on the general proposition of administrative law explained by Judge Wilkey: "*[A]n administrative agency's discretion is the power to make a reasoned choice of alternatives within a class of permissible actions.*" 485 F.2d at 1030 (emphasis in original). The failure to "rationally choose among the possible alternatives" is "either an unsupported exercise of discretion or an arbitrary failure to exercise discretion at all." 485 F.2d at 1029, 1030.[27]

Vermont Yankee Nuclear Power Corp. v. *NRDC*, 435 U.S. 519 (1977), relied upon by petitioners, is not to the contrary. That case held that reviewing courts may not "engraf[t] their own notions of proper *procedures* upon agencies." *Id.* at 525 (emphasis added). *See id.* at 543, 544, 546. But the requirement that agencies consider the reasonable alternatives to their actions is not a *procedural* requirement at all, but a substantive one. It is not an expansion of the procedural rulemaking requirements of 5 U.S.C. § 553, as was the case in *Vermont Yankee*, but a traditional application of the "arbitrary and capricious" standard set forth in 5 U.S.C. § 706(2)(A).

Vermont Yankee did state that an agency "cannot be found wanting simply because the agency failed to in-

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[27] *See also Food Marketing Institute* v. *ICC*, 587 F.2d 1285, 1292 (D.C. Cir. 1978); *United States* v. *Nova Scotia Food Products*, 568 F.2d 240, 253 (2d Cir. 1977); Exec. Order 12291 § 2(d), 46 Fed. Reg. 13,193 (Feb. 17, 1981) (requiring agencies to choose "the alternative involving the least net cost to society").

clude every alternative device and thought conceivable by the mind of man . . regardless of how uncommon or unknown that alternative might have been . . . ." *Id.* at 551. But that is hardly the situation here. The alternative of barring easily detachable belts—thereby limiting compliance to nondetachables or airbags—was neither novel nor complex. The existing rule expressly authorized nondetachable belts and airbags—indeed it was General Motors which had pressed the agency to permit nondetachable belts in the first place. *See infra* at 33-34. Both devices had already been used effectively in thousands of automobiles; in fact they were the only kinds of passive restraint that had been previously used, and were the very devices that everyone had expected the automakers to use again in 1981. The agency's own cost estimates indicated that nondetachable belts were *less* expensive than the new, easily detachable designs. NHTSA FRIA at VI-37 (R. 199). Accordingly, there could not have been any more obvious alternative than barring compliance with the new, easily detachable belts.

Nor does the obligation to consider obvious alternatives contravene the supposed principle that agencies "are generally free to determine when they will address particular regulatory issues," which MVMA asserts to mean that NHTSA should have been permitted first to rescind the passive restraint standard altogether, and then—at its leisure, if ever—to consider a "nondetachable" rule. As every one of the cases cited by MVMA in support of its "principle" indicates, this is a doctrine which applies to agency *refusals* to act in the first instance.[28] The commentators who proposed barring detachable belts were not asking the agency to "address" a new program; they were asking it to plug a loophole in its existing program.

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[28] *See* MVMA Brief at 40 n.74, *citing WWHT* v. *FCC*, 656 F.2d 807 (D.C. Cir. 1981); *Southland Mower Co.* v. *CPSC*, 619 F.2d 499 (5th Cir. 1980); *National Black Media Coalition* v. *FCC*, 589 F.2d 578 (D.C. Cir. 1978).

But more important, it must be remembered that this was not some academic exercise the agency was conducting. NHTSA had agreed that *non*detachable belts *would* boost usage rates substantially, and its own figures revealed that each year's delay in installation would cost the country thousands of deaths and tens of thousands of injuries. *See supra* pp. 20-23. Given that cost, and given that Congress intended "safety" to be NHTSA's "overriding consideration," S. Rep. No. 1301 at 6, it would have been an abuse of discretion to delay consideration of the obvious alternative to rescission.

2. *NHTSA Faced No Procedural Bar to Prohibiting Detachable Belts.* In the court of appeals, MVMA argued that NHTSA would have been procedurally barred from prohibiting the new detachable belt because it had not suggested that specific alternative in its initial Notice of Proposed Rulemaking. MVMA (Court of Appeals) Brief at 62. Both MVMA and the federal parties now appear to have lost confidence in this point, no longer contending that the agency *would* have been barred, but only that if it had prohibited detachables it would have raised a "substantial question," MVMA Brief at 38 n.69, or "might have faced challenges from the manufacturers," Brief for Federal Parties at 37.

It is plain that such challenges would have been without merit. The authorities cited by petitioners merely confirm the well-settled proposition that an administrative agency has the authority to respond to issues and evidence presented in the course of a rulemaking, and to modify its proposals, "so long as the final rule is a 'logical outgrowth' of the proposals highlighted and discussed during the notice and comment period." *Sierra Club* v. *Costle*, 657 F.2d 298, 352 (D.C. Cir. 1981).[29]

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[29] *See* MVMA Brief at 38 n.69, *citing* 5 U.S.C. § 553 ("the notice shall include . . . *either* the terms or substance of the proposed rule *or* a description of the subjects and issues involved"); *Weyerhaeuser* v. *Costle*, 590 F.2d 1011, 1030-31 (D.C. Cir. 1978); *American Frozen Food Inst.* v. *Train*, 539 F.2d 107, 134-35 (D.C. Cir. 1979).

As set out above, if the agency felt that detachable belts would not satisfy the safety goals of the statute, there could have been no more "logical outgrowth" to this rulemaking than barring them as a means of compliance. Nor can the automakers fairly contend that the issue was not subsumed within the original Notice, or that it was not fully ventilated in the rulemaking.[30] The value of detachable as compared to nondetachable belts was the central issue in the rulemaking; no party has ever suggested that it had additional evidence on the subject which it refrained from submitting for lack of notice. Accordingly, any imagined procedural objection to considering a bar on detachable belts would have been without foundation.

D. NHTSA Did in Fact Consider Barring the Allegedly Ineffective Design, but Rejected That Alternative for Arbitrary and Capricious Reasons

Although petitioners devote substantial portions of their briefs to arguing that NHTSA neither had to consider, nor could have considered, the alternative of plugging the loophole in the passive restraint rule, the fact is that NHTSA *did* consider that alternative. Pet. App. 109a. Moreover, the reasons that the agency gave for rejecting that alternative did *not* include the two discussed in the preceding section: *i.e.*, a lack of obligation or authority to consider prohibiting detachable belts. Those justifications are merely *post hoc* rationalizations of counsel, entitled to no weight in this Court.[31] Hence, this

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[30] NHTSA's Notice of Proposed Rulemaking called for broad public comment to identify the "most effective and reasonable approach to addressing the serious safety problems posed by the low rate of safety belt use," 46 Fed. Reg. at 21,206 (R. 13). As NHTSA's Final Notice acknowledged, several commentators responded by suggesting that detachable belts be barred. Pet. App. 109a.

[31] "The courts may not accept appellate counsel's *post hoc* rationalizations for agency action; *Chenery* requires that an agency's discretionary order be upheld, if at all, on the same basis articulated in the order by the agency itself." *Burlington*

case presents only one straightforward question: were the actual justifications offered by NHTSA for rescinding the standard, instead of barring compliance by detachable belts, arbitrary and capricious?

That question can only be answered in the affirmative. As the court of appeals discovered, NHTSA did not "devot[e] even a modicum of reasoned analysis" to the proposal to bar detachable belts, "summarily reject[ing]" it in three brief paragraphs, Pet. App. 55a. *See* Pet. App. 109a-110a. The agency's three reasons for rejecting this obvious alternative can only be characterized as "hollow" and "capricious." *Id.* at 56a, 58a.[32]

1. *Emergency Release.* One reason NHTSA gave for declining to bar the new detachable belt was its concern that it not impose a requirement that would "complicate the extrication of any occupant from his or her car" in an emergency. Pet. App. 110a. Such a concern would obviously be proper, if there were support for the notion that it applied to nondetachable belts. However, as the court of appeals noted, "NHTSA has not suggested, nor is there *any* evidence for [the] proposition, that the emergency release mechanisms" used in nondetachable belts are any less effective for emergency egress than the buckle release system used in detachable belts; in fact, the evidence is all to the contrary. Pet. App. 61a (emphasis added).

The device used to obtain emergency egress from a nondetachable belt is known as a "spool release," because it permits the occupant to "spool out" the belt and create the necessary slack. In 1978, General Motors sought NHTSA's permission to use such a device, explaining

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Truck Lines, 371 U.S. at 168-69. *Accord, American Textile Manufacturers Inst.* v. *Donovan*, 452 U.S. 490, 539 (1981).

[32] Indeed, the Comptroller General has recently singled out NHTSA's consideration of the alternatives in this case as a prime example of "poor" agency analysis. GAO, Report on Regulatory Analysis, App. II at 11 (Nov. 2, 1982).

that it would "provide for rapid egress without use of a buckle release mechanism." Nondetachable belts equipped with spool releases, said the automaker, were as safe as detachable belts with buckle releases:

> "[T]here is, to our knowledge, no clear cut advantage of one emergency release system over another. While it appears that release by separation might be slightly more convenient in a particular instance, our evaluations suggest that pushbutton activated buckle release may be difficult for some people in another instance . . . ." 43 Fed. Reg. 21,912, 21,913-14 (1978) (R. 1724-25).

NHTSA agreed, promptly granting GM permission to utilize the device because "the agency does not believe that the use of [such] release mechanisms will cause serious occupant egress problems . . . ." 43 Fed. Reg. 52,493, 52,494 (1978) (R. 1706).

General Motors' belief in the safety of nondetachable belts continued down to the present rulemaking. At the hearing conducted by NHTSA, Administrator Peck asked David Martin, Director of Automotive Safety Engineering for GM, whether nondetachable belts were any less safe than detachables. Mr. Martin had no doubts:

> "CHAIRMAN PECK: In an emergency situation, do you perceive any safety advantages or disadvantages between a complete disconnect and a spool out which you've just described?
>
> "MR. MARTIN: No. That's why we petitioned for the spool out. We think that the spool out is viable from a safety egress point of view under emergency." Hearing Tr. at 94-95 (R. 1225-26).

Faced with this unanswerable rulemaking record—and the unambiguous admissions of its leading member (GM) —the MVMA has attempted to muddy the waters by distorting the history of the emergency release provision, suggesting that NHTSA has had a "continuing . . . commitment to detachability" for reasons of safety. MVMA Brief at 43-44. Nothing could be further from the truth.

From the very first, NHTSA recognized that passive restraints would need to have an emergency release capability. "The agency cautioned, however, that the emergency release capability could not be allowed to nullify the advantages of the passive restraint system." Pet. App. 7a. Accordingly, the first passive restraint notice, issued in 1971, contemplated that a spool release would be used and that detachable belts would be barred. 36 Fed. Reg. 12,866 (1971) (R. 2497).

In 1974, NHTSA did—at the suggestion of an automaker—modify the rule to provide for emergency release by a detachable buckle. It did so, however, *only* because of the availability of ignition interlocks. Although NHTSA recognized that a detachable mechanism might create the "temptation to defeat the passive belt," it concluded that if the buckle were "guarded by" an interlock, so that the car could not be started unless the belt were buckled, that problem would be mitigated. 39 Fed. Reg. 14,593-94 (1974) (R. 2319-20). Accordingly, the agency "permit[ted] belt separation—*provided the restraint system was guarded by an ignition interlock . . . to encourage reattachment . . . .*" Pet. App. 9a.

NHTSA's ability to require manufacturers to guard the emergency buckle with an ignition interlock was removed when Congress banned the interlock in 1974. Accordingly, the agency eliminated the interlock requirement from the passive restraint rule. 39 Fed. Reg. 38,380 (1974) (R. 2309). However, because NHTSA eliminated the interlock without revisiting the emergency release provision, this left the buckle release as the only means of compliance. Pet. App. 10a. Although this did not pose a problem during the next few years, given that the *Chrysler* decision had suspended the rule, Secretary Adams' 1977 reinstatement of the mandatory deadline once again brought the question of emergency release to the fore. Significantly, it was GM which petitioned the agency to permit the use of nondetachable belts equipped with spool releases, emphasizing that such devices would

"maximize automatic seat belt usage," and yet be as safe as detachables. 43 Fed. Reg. at 21,914 (R. 1724). As already described, NHTSA promptly granted GM's petition, and in the following years the only passive belts on the road were those either guarded with ignition interlocks—and so, as NHTSA has described, "practically nondetachable"—or equipped with versions of the nondetachable spool-out release.[33]

In sum, contrary to MVMA's claims, there was no "continuing agency commitment" to detachability for reasons of safety. In the entire history of the passive restraint rule, NHTSA has never questioned the safety of nondetachable belts.

2. *"Widespread and Irrational Fear."* The second reason given by NHTSA for refusing to bar easily detachable belts was that "recent attitudinal research" revealed a "widespread, latent *and irrational* fear in many members of the public that they could be trapped by the seat belt after a crash." That fear, the agency said, could "be a contributory facto[r] in decisions by many people not to wear" a seat belt. Pet. App. 110a (emphasis added).

In fact, the "recent attitudinal research" relied upon by NHTSA does *not* establish the existence of widespread fear—irrational or otherwise. The evidence on which NHTSA relied for this proposition, the 1981 National Safety Belt Study, found that when interviewees were asked why they thought most people did not wear their present manual seat belts, *only 7%* volunteered "fear of being trapped" as the explanation. R. 1108; *see* Pet. App. 60a n.34.[34] NHTSA's own evidence thus directly contradicts the agency's purported rationale.

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[33] *See supra* note 6. Indeed, when a belt manufacturer wrote NHTSA in 1980 to inquire whether a truly detachable belt would still satisfy the requirements of the rule, NHTSA wrote back expressing disapproval of the device. (R. 1636).

[34] Higher percentages were not reached until entrapment was specifically suggested. The only other agency-sponsored research in the record confirms the 7% figure almost exactly. NHTSA FRIA

The MVMA and Pacific Legal Foundation have endeavored to twist NHTSA's point regarding fear of entrapment into a more general assertion that the public is "hostile" to nondetachable belts. MVMA Brief at 45; PLF Brief at 4. This was not, however, one of the reasons NHTSA gave for declining to bar detachables, *see* Pet. App. 52a n.30; it is a *post hoc* justification entitled to no weight. NHTSA itself never found any evidence of widespread public hostility to nondetachable belts, and it dismissed the purported "evidence" which the manufacturers offered on this score as "fallacious."[35] It is plain that the "universal hostility" to which the manufacturers refer is their own.[36]

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at IV-25 (R. 81) (1978 Teknekron study disclosing that only 8% of respondents feel "belts are dangerous"). MVMA's claim that the agency's rationale is "well supported by the record," MVMA Brief at 45 n.88, is purportedly based on two older surveys, commissioned by the automakers themselves, upon which the agency did not rely but which do not materially contradict the agency's surveys. *See* R. 1978, 1981 (responses of 1% and 10%); R. 1639, 1651 (no percentages given). Moreover, all of these surveys were directed at users of manual belts only, and hence provide no data from which any conclusions can be drawn regarding automatic belts.

[35] The manufacturers offered the lack of consumer demand for the 1980 Chevette (which was equipped with a nondetachable belt) as evidence of this consumer hostility. The agency responded that "GM's comparisons of *voluntary* purchases of automatic belts in Chevettes to potential consumer reaction to *mandated* automatic belts may be fallacious." NHTSA FRIA at IX-4 (R. 219). It also pointed out "that Rabbit dealers did more selling of the automatic safety belt feature than GM dealers," NHTSA Prog. Rep., *supra* at 42 (R. 1633), and that "VW's corporate management has testified that it has never experienced any negative reaction to its (Rabbit) automatic belt system," NHTSA FRIA at IX-21 (R. 236).

The manufacturers have also pointed to the "lesson" of the 1974 interlock controversy as evidence of consumer hostility to nondetachable belts. However, as NHTSA rejoined, the "so-called 'ground swell' of protests over the starter interlock actually involved much fewer than 1% of the new car market . . . ." *Id.* at IX-19 (R. 234).

[36] In any event, the relevance of public reaction to passive restraints must be put in perspective. Although the *Pacific Legal*

3. *Congressional Disfavor.* NHTSA's final reason for rejecting nondetachable belts and refusing to bar the new detachables was that the 1974 interlock episode "suggests that Congress would look with some disfavor upon any similar attempt to impose a use-compelling feature on a belt system." Pet. App. 109a-110a. That rationale is a *non sequitur.* As NHTSA itself observed in 1977, the characteristic of interlock-guarded manual belts to which Congress objected in 1974—the fact that they require affirmative action (buckling up) in order to start the car—is not a problem with automatic belts. 42 Fed. Reg. at 34,291 (R. 1736). *Accord, Pacific Legal Foundation* v. *DOT*, 593 F.2d at 1346. *See generally* NHTSA FRIA at II-4 (R. 30). Automatic belts, by definition, require "no action" on the part of the occupant. 49 C.F.R. § 571.208 (S.4.1.3(a)).

Nor, as the court of appeals explained in detail, is there anything in the legislative history of the 1974 Amendments which suggests that Congress' distaste for interlocks extended to passive restraints. Congress was quite specific in indicating which parts of Standard 208 it wanted changed,[37] while rejecting an amendment pro-

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Foundation court did—as MVMA states—hold that NHTSA had an obligation to take public reaction into account, it did not—as MVMA implies—mean to suggest that safety standards should be subject to popularity contests. 593 F.2d at 1345. As that court explained, the relevance of public reaction is that it can affect usage rates. Similarly, in this case NHTSA explained that the relevance of whatever "irrational fear" the public might have is that it can be a "contributory facto[r] in decisions by many people not to wear" the belts. Pet. App. 110a. Yet, the agency has already conceded that nondetachable belts will increase usage rates by an amount which can be calculated to save thousands of lives, hundreds of thousands of injuries, and billions of dollars. Hence, even if there were a limited amount of "fear" or "hostility," the agency has effectively conceded that it is insufficient to prevent nondetachable belts from being extremely valuable safety devices.

[37] For example, it required that warning buzzers not exceed eight seconds in duration, banned the interlock, and added a legislative veto provision. *See* 15 U.S.C. § 1410b.

posed by Representative Wyman that would have barred a mandatory passive restraint standard. *See* Pet. App. at 33a-35a. As the petitioners in this case have become fond of saying, "[i]f Congress wishes to require NHTSA to take some specific action on passive restraints, it is perfectly capable of [saying] so." PLF Brief at 15.[38]

* * * *

The most arbitrary aspect of NHTSA's failure to ban the easily detachable belt is not just that the alleged disadvantages of nondetachables were without record support, but that the agency made no effort to explain why those disadvantages (even if true) outweighed the belts' conceded safety advantages. Even assuming that nondetachable belts might impede egress in some circumstances or might engender irrational fears, why do those disadvantages outweigh the prevention of thousands of deaths and tens of thousands of injuries? As the court of appeals pointed out, although the agency attempted to compare the costs and benefits of detachable belts, for nondetachables it did nothing more than list their three alleged disadvantages. Pet. App. 55a.[39]

In short, by its decision in this case, NHTSA abandoned a 12-year commitment to auto safety because the

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[38] NHTSA's Final Order did not contend that events in Congress *since* the 1974 Amendments gave it any insight as to Congress' views regarding passive restraints. Although that post-enactment history may be read as suggesting affirmative congressional approval of passive restraints, *see* Pet. App. 36a-46a, respondents do not dispute petitioners' conclusion that "[n]o significant meaning can be deduced from any of these 'congressional reactions.'" MVMA Brief at 33.

[39] As Justice Powell said in his concurrence in *Industrial Union Department* v. *American Petroleum Institute*, 448 U.S. 607, 664, 670 (1980), "[n]o rational system of regulation can permit" an agency to "simply announc[e] its finding of cost-justification without explaining the method by which it determines that the benefits justify the costs . . . ." *See* Exec. Order 12291 § 2(b) & (c) (Feb. 17, 1981) (requiring agencies to weigh the costs and benefits of alternative rules, and to choose the one which "maximiz[es] the net benefits to society").

industry it was instructed by Congress to regulate threatened to comply with such regulation by installing devices which constituted the "worst available technology." The agency then rejected the obvious alternative to abandonment for reasons lacking any support in the record, and without weighing those reasons against the conceded life-saving potential of that alternative. "Arbitrary" and "capricious" are, if anything, gentle words to apply to that kind of decisionmaking.

III. IT WAS ARBITRARY AND CAPRICIOUS TO RESCIND EVEN A STANDARD WHICH PERMITTED THE NEW DESIGN

The foregoing analysis has proceeded on the assumption that NHTSA was correct in finding that it could not "reliably predict" the usage rates of detachable belts based on the existing evidence regarding nondetachables. Pet. App. 104a. Respondents have argued that even if that were so, it was arbitrary and capricious to rescind the passive restraint rule altogether, rather than amend it to bar the new design. But in fact, the agency's finding of "substantial uncertainty" regarding the usage rates of detachables was itself arbitrary and capricious. The record evidence established that usage rates far in excess of those necessary to achieve cost-effectiveness would result from the installation of detachable automatic belts. NHTSA simply manufactured uncertainty where none actually existed.

A. Substantial Uncertainty Can Justify Rescission, But Only if It Is Consistent with the Record

The issue before this Court is *not*, as petitioners assert, whether an agency may rescind a regulation because of substantial uncertainty that it will achieve its intended purpose. Respondents do not contend that an agency must go forward with a regulation if the evidence creates justifiable uncertainty as to whether the regulation will be effective. But by the same token, an administrator may not revoke a duly promulgated regulation simply by pro-

nouncing himself "uncertain" of its benefits. A reviewing court must subject this asserted basis for agency action to "a thorough, probing, in-depth review," to determine whether the avowed uncertainty is consistent with the administrative record. *See Citizens to Preserve Overton Park*, 401 U.S. at 415.

B. NHTSA's Finding of Substantial Uncertainty Regarding the Usage Rates of Detachable Belts Was Arbitrary and Capricious in Light of the Record

As explained above, NHTSA has determined that the passive restraint rule would be cost-effective—measured in dollars as well as in lives—if installation of automatic belts would increase current usage by just 13 percentage points. *See supra* p. 21. As also set forth above, NHTSA-sponsored surveys of every automatic belt system already in use in hundreds of thousands of automobiles have revealed that those devices increased usage by at least 40 percentage points—roughly three times that break-even level. *See supra* pp. 20-21. Nonetheless, NHTSA declined to apply this consistent evidence in its analysis of the rescission proposal. The reasons NHTSA gave for refusing to rely on the record evidence do not survive examination.

NHTSA's primary justification for rejecting the data was that it reflected usage rates for nondetachable belts. Most of that improved usage, the agency said, was "due to the nondetachability feature." Pet. App. 102a. The assumption is that because most people fail to buckle manual belts, they will also (if given the opportunity) unbuckle automatic belts. The validity of that assumption, however, depends upon the reason people fail to buckle their manual belts. If the reason is that they object to wearing seat belts, then the assumption may well be true. But if most people fail to buckle-up because of laziness or forgetfulness, then they can be expected to use automatic belts—even detachable ones—because, as NHTSA recognized, "automatic restraint systems eliminate the need for any action by the occupant to obtain

crash protection benefits." NHTSA FRIA at II-4 (R. 30).

In fact, NHTSA-sponsored surveys do reveal that the two most important reasons people give for not wearing manual belts are that (1) the belts take "too much time" to put on, and (2) the occupants are "too lazy" or forgetful to buckle-up. National Safety Belt Study at 7 (R. 1108).[40] Since detachable automatic belts overcome these causes and put inertia on the side of wearing belts, the assumption that detachables would do no better than manual belts is contrary to the record. Only by ignoring its own evidence as to the reasons for seat belt nonuse could the agency conclude that not even a 13 point improvement was predictable.

NHTSA offered two other justifications for rejecting the evidence on usage increases from existing automatic belts. First, although the agency believed that most (about four-fifths) of the experienced increase could be attributed to nondetachable features, it asserted that a portion of the balance of that increase was due to the demographics of owners of Rabbits and Chevettes, and to the fact that small car owners are more likely to perceive safety risks than large car owners. Pet. App. 102a, 97a-98a. This assertion is belied by the record. A NHTSA-sponsored study has shown that "[s]eat belt use is *not* a behavior which is sharply differentiated by traditional demographic and geographic characteristics of the population." National Safety Belt Study at 22 (R. 1117) (emphasis added). Moreover, any demographic skewing would affect the manual as well as automatic belt rates of the cars studied, and thus would not affect the incre-

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[40] Another NHTSA-sponsored survey found that 68% of the people polled gave as their reasons for not buckling up "bothersome, inconvenient, forgot." NHTSA FRIA at IV-25 (R. 81). When people were asked how they felt about installation of automatic seatbelts in their next car, 63% responded favorably, and fewer than one-third said that they would disconnect the belts. *Id.* at IV-37 (R. 93).

mental usage rate (*i.e.*, the difference between the automatic and manual rates). NHTSA FRIA at IV-54 (R. 110). And, even if past usage data were weighted in favor of small cars, DOT has recognized that small cars account for nearly 50% of all passenger sales and are projected to account for 90%. DOT, Motor Vehicle Safety, *supra* at 2; NHTSA Feb. RIA at IV-4. NHTSA's demographic concern was, therefore, an invalid basis for rejecting the usage data.

Second, NHTSA speculated that the remainder of the experienced usage increase in Rabbits and Chevettes was attributable to volunteerism: the owners voluntarily purchased the automatic belts and thus were more likely to use them. Pet. App. 98a, 102a-103a. The record discredits this assertion as well. Only 5% of Chevette owners and 12% of Rabbit owners requested automatic belts; many of the owners did not know that the cars contained automatic belts, and many had no choice but to accept them.[41] The agency itself recognized that "[t]he restraint system seems to play a very minor role in the purchase of a car." NHTSA FRIA at IV-34 (R. 90).

In sum, when NHTSA's claim of substantial uncertainty regarding usage rates of detachable belts is measured against the record, it is shown to be devoid of any evidentiary basis.[42] Although NHTSA could not predict the *precise* increase that would occur, no such precision

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[41] NHTSA FRIA at IV-34 to 35 (R. 90-91). *See* Automatic Safety Belt Systems Owner Usage and Attitudes, at x, 8-10 (May 1980) (R. 916, 928-30); *id.* (Feb. 1981) at xi, 14 (R. 1008, 1023).

[42] Petitioners' assertion that "the court of appeals sustained NHTSA's findings" of uncertainty as to the effectiveness of detachable belts, Brief for Federal Parties at 19 n.17, is incorrect. Based upon its review of the record, the court of appeals rejected "NHTSA's conjectural efforts to distinguish" the available usage data. The court observed that the usage studies in the record indicated that the benefits of detachable belts would exceed their costs. Pet. App. 51a-53a.

was necessary.[43] Even if the agency believed the rule had to be cost-effective to be justifiable, *but see supra* note 21, it only needed to find that the usage increase would likely equal or exceed 13 points. All the evidence in the record—both as to current automatic-belt usage, and as to the reasons for nonuse of manual belts—established that usage would increase by more than 13 points, even with detachable belts. NHTSA's speculative efforts to discredit those data are refuted by the evidence that the agency itself collected. The "substantial uncertainty" upon which NHTSA premised the rescission does not exist.

C. NHTSA's Other Objections to Detachable Belts Were Insubstantial

In addition to "uncertainty," NHTSA suggested three other reasons for not requiring the installation of detachable belts. First, NHTSA suggested that the public might regard automatic restraint requirements as "an expensive example of ineffective regulation," which might generate a public backlash against all mandatory safety measures. Pet. App. 107a-108a. This objection depends wholly upon the validity of NHTSA's assumption that automatic belts will fail to increase usage—an assumption that the record contradicts. NHTSA did not suggest that the public would object to passive restraints if they did succeed in reducing automotive death and injury, and there is no evidence of any general hostility of the public toward passive restraints. *See supra* p. 35.

NHTSA's second objection to passive restraints was philosophical: that it would be inequitable to require a person who uses manual belts to purchase automatic belts,

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[43] As Secretary Adams noted, the agency can never have that kind of certainty when promulgating a safety standard, since the purpose of the Act was to force the industry to implement technologies not yet in use, and thus lacking on-the-road experience. That was what Adams meant when he said that NHTSA must often make predictive judgments without "real world statistical proof," a point quoted out of context in MVMA's Brief, at 23 & n.39. *See* 42 Fed. Reg. at 34,292 (R. 1737).

because he would be subsidizing nonusers of manual belts without gaining additional protection himself.[44] This theoretical objection—applicable to at most 11% of the motoring public (the percentage that currently use belts)—pales in comparison to the massive social savings in avoided deaths, injuries, and economic loss that would result from implementation of the passive restraint rule. Moreover, all drivers—including current users of manual belts—would enjoy insurance-premium reductions that could exceed the cost of the new belts. 12 Bell J. Econ., *supra* at 44 (R. 731).

Finally, NHTSA indicated that it would replace the passive restraint requirement with a public-education program that encouraged people to use manual seatbelts. Pet. App. 110a-112a. Unfortunately, the record establishes that every public education effort undertaken by NHTSA has failed to increase seat belt usage rates significantly.[45] Indeed, because of that dismal record, Congress, in passing the current DOT appropriations act, barred the agency from proceeding with its proposed educational program until it receives Congressional approval. H.R. Conf. Rep. No. 960, 97th Cong., 2d Sess. 13 (Dec. 13, 1982). The Conference Committee stated:[46]

> "Over the past decade, NHTSA has undertaken numerous efforts at significant cost to promote safety

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[44] Pet. App. 109a. Of course, this objection is equally true of manual belts: Standard 208 requires all persons to buy manual belts, even though 89% of the population does not use them at any given time. Yet NHTSA has never characterized that as an "inequitable subsidization" of the 11% minority.

[45] *See* Nordhaus Comment, App. C (R. 543-44); Comments of the Insurance Institute for Highway Safety, App. A (May 1981) (R. 454-56). Even if an education campaign worked, it would similarly increase the usage rates for passive restraints, thus maintaining their incremental advantage over manual belts.

[46] The Committee also referred to a draft report by the General Accounting Office that found that NHTSA had never determined that the educational program would be cost-effective. *Id.*

> belt usage. These efforts have had no lasting effect. . . . Although NHTSA contends that its new program is significantly different from past programs, the conferees have been presented with little evidence to support claims that it will have any better long-term results than past efforts." *Id.* at 12.

* * *

In sum, even assuming that the automakers would have complied with the passive restraint standard by using detachable belts, NHTSA's concerns about those belts did not justify rescission. The record established that the benefits of such belts would outweigh their minimal costs.[47]

IV. THE COURT OF APPEALS PROPERLY VACATED AND REMANDED THE RESCISSION, STAYING THE EFFECTIVENESS OF THE UNDERLYING RULE TO ENABLE THE AUTOMAKERS TO COMPLY

Having correctly determined that NHTSA's rescission of the passive restraint rule was arbitrary and capricious, the court of appeals did three things: it vacated the

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[47] Petitioner Pacific Legal Foundation also relies upon a "libertarian" argument that was not advanced by NHTSA: that people who prefer passive restraints should be allowed to buy them, but that people who oppose the restraints should not be forced to use them. PLF Br. at 5. Yet, as a practical matter, passive restraints simply are not available for those who want to buy them; absent a federal requirement, only one manufacturer (Mercedes) has indicated it will offer airbags, and automatic belts are available on only a few models.

The best answer to this libertarian argument, however, comes from one of its former adherents, columnist George F. Will:

> ". . . I regret[] having once argued that government has no business requiring drivers to buy and use inexpensive devices that might save them from self-destruction. There is a pitiless abstractness, and disrespect for life, in such dogmatic respect for the right of consenting adults to behave in ways disastrous to themselves. Besides, too many children passengers are sacrificed on that altar. And a large part of the bill for the irrationality of individual drivers is paid by society." *Driving Without Restraint*, Wash. Post, April 14, 1977, at A19.

rescission and remanded the matter to the agency; it temporarily stayed the effectiveness of the underlying rule in order to enable the automakers to comply; and it left the agency free to conduct further rulemaking. The court of appeals thereby provided an appropriate remedy for NHTSA's unlawful action, without intruding into the agency's internal processes.

This Court has held that "[i]f the decision of the agency 'is not sustainable on the administrative record made, then the . . . decision must be vacated and the matter remanded . . . for further consideration.'" *FPC* v. *Transcontinental Gas Pipe Line Corp.*, 423 U.S. 326, 331 (1976), *quoting Camp* v. *Pitts*, 411 U.S. 138, 142 (1973). That is precisely what the court of appeals did here. In its judgment order, the court vacated the rescission and remanded the case to NHTSA. Pet. App. 161a. The court did *not* order that the passive restraint rule must take effect—an action that would have precluded NHTSA from further rulemaking on the matter. On the contrary, the court of appeals stated that NHTSA remained free to modify, suspend, or rescind the rule. Pet. App. 74a.

The court of appeals also offered NHTSA another opportunity to "fin[d] nonarbitrary reasons for rescinding the standard." *Id.* NHTSA sought to exploit that opportunity, however, to gain further delay: it proposed reopening the rulemaking proceedings and undertaking "fact gathering . . . which would take one or more years to complete." Pet. App. 133a. To avoid being drawn into this "open-ended DOT decisionmaking," the court of appeals on August 4 made clear that it would simply vacate and remand the case; the agency could thereafter proceed with whatever rulemaking it wished, including modification or rescission, at whatever pace it desired. Pet. App. 82a.

As the court of appeals explained, however, the effect of vacating NHTSA's rescission "was to restore Standard

208 to the status quo ante litem," *i.e.*, the unrescinded rule remained in effect. Pet. App. 81a. That conclusion regarding the effect of vacating an agency's attempted revocation of a rule is the same one recently reached both by the Third Circuit in *NRDC* v. *EPA*, 683 F.2d at 767-69, and by Judge Wilkey for the District of Columbia Circuit in *Consumer Energy Council* v. *FERC*, 673 F.2d 425, 479 (D.C. Cir. 1982), *petition for cert. filed*, 51 U.S.L.W. 3099 (Aug. 8, 1982) (No. 82-177).

But Standard 208, as it stood prior to the rescission, required automakers to install passive restraints in large and mid-sized cars by September 1, 1982—a deadline less than one month away when the court issued its mandate. Because the automakers had dismantled their passive restraint programs within hours after NHTSA's rescission order was announced, the court of appeals recognized that the manufacturers could not possibly comply with the passive restraint requirement by the September 1 deadline. The court therefore exercised its equity powers to stay the compliance date for another year—in effect granting a stay of its own order vacating the rescission. At the same time, the court solicited NHTSA's advice as to whether that stay was sufficient to enable the automakers to comply. Pet. App. 81a-82a. But the court also made it clear to the agency that it remained free at any time to take action of its own aimed at modifying the standard or overturning it altogether. *Id.*

The court of appeals clearly had the authority to issue that temporary stay. Judge Wilkey recently issued just such a stay of a preexisting rule after holding that FERC's attempted revocation of the rule was invalid. *Consumer Energy Council*, 673 F.2d at 479. As the MVMA points out, a stay of the passive restraint rule was also issued by the Sixth Circuit in the *Chrysler* case, in order to give the agency time to correct the difficulties with the test dummy. MVMA Pet. at 27 n.54; *see* 472 F.2d at 681. *Cf. Mobay Chemical Corp.* v. *Gorsuch*, 682 F.2d 419, 427 (3d Cir.) (delaying reversal of pesticide

regulations for six months to enable agency to promulgate them properly), *cert. denied*, 103 S. Ct. 343 (1982). This Court has on several occasions effectively done the same thing, staying the effect of its own decisions invalidating statutes so as to provide Congress with time to respond. *See, e.g., Northern Pipeline Construction Co.* v. *Marathon Pipeline Co.*, 102 S. Ct. 2858, 2880 (1982); *Buckley* v. *Valeo*, 424 U.S. 1, 142-43 (1976). All of these actions are no more than specific applications of the general principle that a reviewing court has the equitable authority to tailor its relief to the practical exigencies of the case. *See, e.g., Ford Motor Co.* v. *NLRB*, 305 U.S. 364, 373 (1939); *Florida Power & Light Co.* v. *Costle*, 650 F.2d 579, 590 (5th Cir. 1981).[48]

Petitioners' argument that the court below somehow violated this Court's decision in *Vermont Yankee* ignores what the court of appeals actually did. Unlike the situation in *Vermont Yankee*, the court here did *not* dictate "the methods, procedures, and time dimension" to be followed by the agency on remand. 435 U.S. at 545. On the contrary, the court did not order NHTSA to do *anything* on remand; it expressly left the agency free to proceed in whatever manner, and at whatever pace, it preferred. Pet. App. 82a.[49]

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[48] To be sure, the Secretary of DOT also has the power under 15 U.S.C. § 1392(c), (e) to delay the effective date of a safety standard, but there is nothing in the Safety Act suggesting that this provision was intended to deprive the courts of their historic equity powers. *See* 15 U.S.C. § 1394(a)(6); *cf.* 28 U.S.C. § 1651 (All Writs Act).

[49] Thus, the court below did not, as MVMA implies, "reinstate" a regulation that was "unlawfully modified." MVMA Brief at 47. In any event, a court does have the power to require an agency to take action when the agency's decision not to act is unlawful. *E.g., Adams v. Richardson*, 480 F.2d 1159 (D.C. Cir. 1973) (*en banc*) (requiring HEW to commence enforcement proceedings).

The various ICC Act cases cited by MVMA for the proposition that a court may not reinstate a rule are not applicable to this case.

Petitioners' claim that the court of appeals invaded NHTSA's primary jurisdiction is also without merit. That doctrine reserves to an agency the *initial* determination of matters within the scope of its statutory authority; but it does not exempt those determinations from subsequent judicial review. Here, NHTSA *did* determine, in the first instance, whether the passive restraint rule should be continued or rescinded. The court of appeals' order vacating that determination did not intrude upon NHTSA's primary jurisdiction in any way.

The primary jurisdiction doctrine is equally inapplicable to the court's subsequent order staying the effect of its decision until September 1983. That stay was an exercise of the court's own equity powers, not an exercise of agency rulemaking authority. As the court explained, its decision did not foreclose the agency from issuing further orders modifying the rule. Pet. App. 82a. Nothing the court did abridged the agency's authority to postpone the compliance deadline on its own.

Moreover, even as to its own stay, the court did not consider the relevant evidence "in the first instance." MVMA Brief at 48 n.94. Rather, it asked DOT to advise it as to what "compliance dates are achievable." Pet. App. 81a. The automakers submitted their evidence to the agency, and the agency in turn presented its views to the

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They are based on peculiarities of that statute's language, legislative history, and structure "that evidenc[e] a clear purpose" to oust the "equitable power" that a court would otherwise have. *Long Island R.R.* v. *Aberdeen & Rockfish R.R.*, 439 U.S. 1, 7 (1978). *See Burlington Northern, Inc.* v. *United States*, 51 U.S.L.W. 4029, 4031 (U.S. Dec. 13, 1982). No such evidence exists with respect to the Safety Act. Those cases also involved injunctions issued directly against the regulated parties, *i.e.*, the railroads, and not just against the regulatory agency. *See Atchison, T. & S.F.R.R.* v. *Wichita Bd. of Trade*, 412 U.S. at 818-19. Nothing like that occurred in this case.

court. App. to MVMA Brief at 38.[50] Nothing about that procedure, or any other aspect of the court's disposition of the case, violated *Vermont Yankee*.

CONCLUSION

For the foregoing reasons, the decision of the court below should be affirmed.

Respectfully submitted,

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[50] Because the preexisting compliance deadline was only a month away, the court necessarily had to issue at least an interim stay before receiving DOT's submission. However, it expressly asked the agency to advise it as to whether a further stay would be necessary. Pet. App. 81a.